ANN JOO CORPORATION SDN BHD v. CHYE HUP SENG SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[COMPANIES (WINDING-UP) NO: 28NCC-976-11-2013]
16 MARCH 2015

COMPANY LAW: *Winding up – Disposition of properties – Validation order – Application for validation order pursuant to s. 223 Companies Act 1965 – Company wound up before agreements signed – Whether transactions beneficial to general body of creditors – Whether there was honest and good intention in executing transactions – Whether validation of agreements should be granted – Res judicata – Whether applicable*

COMPANY LAW: *Winding up – Disposition of properties – Validation order – Application for validation order pursuant to s. 223 Companies Act 1965 – Application by way of notice of application – Whether procedurally wrong and could not stand – Whether should be by way of notice of motion – Companies (Winding-Up) Rules 1972, r. 7(1) – Applicant's action in making and filing application without leave – Whether allowed – Companies Act 1965, s. 226(2)*

The respondent was a company faced with financial difficulties. In restructuring and settling its debt, the respondent went into negotiations with the applicant. The negotiations resulted in the respondent, with the concurrence of the applicant, wanting to sell its assets and pieces of lands to the applicant. The petitioner presented a winding up petition on 11 November 2013 and pursuant to the petition, the respondent was wound up on 20 January 2014. The applicant and the respondent, despite the winding up, signed the agreements for the purchase of the assets and the pieces of lands on 24 April 2014. The applicant filed its notice of application for orders from this court that the agreements it entered with the wound-up respondent be determined to be valid and enforceable pursuant to s. 223 of the Companies Act 1965 ('CA'). In short, what was being applied were called validation orders. The application was opposed by the petitioner which had wound up the respondent and the official receiver ('OR') as the liquidator of the respondent. The core issue relevant from these facts was whether the validation of the agreements could be allowed in view that the respondent was already wound up before the agreements were signed.

Held (dismissing application):

(1) In determining whether the validation orders requested should be granted, this court must be satisfied that (i) the transactions are beneficial to the general bodies of creditors or (ii) it would be just and fair to allow the same having in mind the good and honest intention of the applicant and respondent in executing the transactions (*Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals;* refd). The facts of the case

showed that the applicant sought to purchase the land and satisfy the chargee of the lands. But that was only one creditor of the respondent. Other creditors would still be left with little recourse as the price of the lands would not satisfy the debt of the company to the chargee. The other creditors of the respondent would be left with nothing with the sale of the lands because the price did not meet the amount of debt owed to the chargee bank. The transactions in the form of the said agreements would not be beneficial to the general bodies of creditors. The agreements thus could not be just and fair as firstly, the agreements did not in any manner address the positions of the other creditors or the very least the majority of them. (paras 38, 41 & 43)

(2) The agreements could not be just and fair bearing in mind the intentions of the applicant and the respondent in executing the same. Both had intended to unfairly and unconscionably defeat the effect of the winding up. The winding up was in any event within the knowledge of the respondent, yet the respondent despite the winding-up order went to execute the judgments. The applicant could not also be absolved from blame in this regard as there was a duty on the part of the applicant as was normally done to do a corporate due diligence exercise before committing itself to the agreements. The applicant could not claim simply because it was not involved in the winding up. Both in fact were in a haste to defeat the winding-up proceedings and the said order of the winding-up by executing the agreements. The applicant then tried to justify the action by seeking the validation orders. This court, however, could not be acting justifiably if it proceeded to allow the application under the circumstances. Without doubt, the two circumstances as required by *Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals* were not met. The same case also unequivocally decided that whether the two conditions were satisfied depend on the facts of each particular case and the court has the unfettered discretion whether to allow the validation orders based on the facts of the case. Because of the inability of the applicant to meet these two conditions, the application of the applicant should not be granted. (paras 45 & 46)

(3) Procedurally, too, the application of the applicant could not stand. The application by way of notice of application filed by the applicant was clearly wrong. For matters pertaining to winding-up of companies and under the circumstances of this case, the application should be by way of notice of motion. This, unfortunately, was not what was filed by the applicant (r. 7(1) Companies (Winding-Up) Rules 1972). The applicant, in order to circumvent the requirement for leave before the validation orders are requested, side stepped that requirement and filed the notice of application. This should not be permitted as leave was required from the court for proceeding against a company such as the respondent which

had been wound up (s. 226(2) Companies Act 1965). The action of the applicant in making and filing the application without leave would not be allowed. (paras 47, 48 & 50)

(4) The arguments and points of issues raised by the applicant here were *res judicata* bearing in mind the same had been raised and decided when the applicant argued the application for stay of the winding-up order. Further, the affidavits of the applicant were also defective both on accounts of the deponent of the affidavits and the Notary Public not proven to understand Bahasa Malaysia and the *jurat* of the applicant's first affidavit not flowing immediately after the last assertion of the deponent. The application for the validation orders therefore were hereby dismissed. (paras 57-60)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Gilbert Engineering Co, Inc v. Zainuddin Ahmad & Ors [2003] 6 MLJ 103 ***(refd)***
Ian James Rogers v. Menteri Sumber Manusia & Satu Lagi [1997] 1 LNS 433 HC ***(refd)***
Mustapha Mohamed (as the receiver and manager of Sykt Ji Seng Hong Plastic Manufacturing Sdn Bhd) v. Ji Seng Hong Plastic Manufacturing SdnBhd (Ng Bak Soon & Ors, petitioners) [2014] 11 MLJ 793 ***(refd)***
UCM Oil-Tex Threading Ltd v. PP Technology Sdn Bhd [2006] 6 CLJ 253 HC ***(refd)***
Voon Mow Chen v. Menteri Dalam Negeri & Anor and Five Other Cases [1993] 4 CLJ 195 HC ***(refd)***
Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals [2013] 3 CLJ 969 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 223, 226(3)
Companies (Winding-Up) Rules 1972, r. 7(1)

For the applicant - Ooi Chih Jen (Nur Khidmah Huzaisham with him); M/s Chris Lim Su Heng
For the petitioner - Yip Fook Thai (Ch'ng Hun Yao with him); M/s Yip & Co
For the Official Receiver - Wahidah Azizi (Noormazlinah Abdul Taib with her); FCs

Reported by Suhainah Wahiduddin

JUDGMENT

Abu Bakar Jais JC:

Introduction

[1] The applicant filed its notice of application for orders from this court that the agreements it entered with the wound-up respondent be determined to be valid and enforceable pursuant to s. 223 of the Companies Act 1965 ('CA'). These agreements are in respect of the purchase by the applicant of the assets and three pieces of lands owned by the respondent. In short, what are being applied are called validation orders.

[2] The application is being opposed by the petitioner which had wound up the respondent and the official receiver ('OR') as the liquidator of the respondent.

Material Facts

[3] For the purpose of the application, the relevant facts are hereby narrated and explained as follows.

[4] This is not the first time the applicant and petitioner are before the court. Both were before the court when it argued for the stay of the winding-up order granted against the respondent. That stay was ultimately refused after parties were heard.

[5] The respondent in turn was in financial difficulties as a going concern. Business was not good for the respondent. It therefore had to restructure and settle its debt. Therefore a restraining order ('RO') to stave off litigations and possible claims was obtained by the respondent on 5 March 2013. The RO was extended four times, the last on 17 March 2014. The respondent had to also negotiate with its creditors including the banks. Through Bank Negara's Corporate Debt Restructuring Committee ('CDRC") the respondent wanted to address its financial woes.

[6] Towards this, there were negotiations between the respondent and the parent company of the applicant. Negotiations resulted in the respondent with the concurrence of the applicant, wanting to sell its assets and pieces of lands to the applicant while the RO was in place. Although the lands have been charged to a bank, the chargee bank is supportive of the sale and does not object to the same.

[7] The petitioner presented the winding-up petition on 11 November 2013 and pursuant to the petition the respondent was wound up on 20 January 2014. The applicant and the respondent despite the winding-up signed the agreements for the purchase of the assets and the pieces of lands on 24 April 2014.

The Applicant's Contentions

[8] The summary of the applicant's arguments is as follows.

[9] The provision of s. 223 of the CA grants this court the power to validate the agreements executed.

[10] The applicant is not involved in the liquidation of the respondent.

[11] It was just and fair to validate the agreements considering the good and honest intentions of the applicant and respondent.

[12] Negotiations towards the purchase of the assets and lands of the respondent were about two years before the commencement of the winding-up proceedings. Therefore it cannot be alleged that the transactions were to dissipate the assets of the respondent.

[13] The transactions to be validated must only involve the chargee to the lands, applicant and respondent and not the petitioner.

[14] The agreements were *bona fide* in view of the need to restructure the facilities under CDRC. It was not to unlawfully dispose the assets in view of the winding-up.

[15] The applicant is not connected at all to the respondent and is an independent entity altogether.

[16] The agreements were entered when the RO was still in place and the interim stay obtained. The respondent had not therefore acted beyond its powers in executing the same.

[17] The applicant had been convinced by the respondent there would be an appeal against the winding-up order and the appeal would most likely succeed as the winding-up was ordered when the RO was in place. Therefore it proceeded to execute the agreements thinking the winding-up order would be set-aside.

[18] The agreements are also *bona fide* as the applicant is ready to buy the assets and lands at market value and not below this value.

[19] The execution of the agreements are beneficial to the general body of creditors of the respondent.

[20] The sale of the assets and lands to the applicant in any event is for the benefit of the registered chargee of these lands who have priority to the same. The purchase price for these lands will satisfy the chargee and therefore would benefit also the respondent.

[21] At para 27 p. 17 of the applicant's written submission, it is clearly stated the applicant contends the sum owed to the chargee bank are far more than the value of the lands.

The Petitioner's Contentions

[22] The gist of the petitioner's submission opposing the application is narrated below.

[23] As a preliminary point, the application by the applicant by way of notice of application is erroneous. The application should be by way of notice of motion.

[24] There is a need for the applicant to obtain leave from the court first before the application could be considered. As the leave was not obtained, the applicant cannot be allowed to be heard for the application.

[25] The affidavits supporting the applicant's applications was affirmed by a Singaporean in Singapore before a Singaporean Notary Public and both have not been shown to understand the national language. The translation in English of that affidavits are of no use as the original affidavits in Bahasa

Malaysia can only stand good if it is demonstrated in the first place that the affidavits sworn in that language is understood both by the deponent and notary public.

[26] The matters and points of arguments raised by the applicant here had already been decided by the court when it heard the stay application against the winding-up order. The issue of estoppel and *res judicata* therefore are against the applicant.

[27] As the agreements were entered after the winding-up order, the same cannot be valid and enforceable.

The OR's Contentions

[28] The agreements executed after the winding-up order was made could not be valid and therefore no validation orders ought to be granted.

[29] The chargee bank as a secured creditor is not bound to the agreements executed. As a secured creditor the chargee bank can move for a foreclosure proceeding without being concerned with the executed agreements.

Issue

[30] Although there are several issues pertaining to this application, the main issue as identified from the submissions of the parties is only whether the agreements can be executed in view of the winding-up. The other issues relevant are ancillary issues to the principle issue. The main issue to be dealt by this court would dispose the matter conclusively for the determination of the application.Therefore the core issue relevant from these facts is simply can the validation of the agreements be allowed in view that the respondent was already wound up before the agreements were signed.

[31] Nonetheless the issue about the matter having been raised earlier by the applicant in the application for stay of the winding-up and issues pertaining to procedure that needs to be followed in respect of the application will be also deliberated by this court for completeness.

Court's Findings

[32] First, the general scenario ought to be pointed out regarding the background as to why these validation orders are normally requested. For this it should be explained that when a company is wound-up, the affairs of the same is no longer in its hands. The transactions or management of the same must be scrutinised so as not to deplete further the resources of these companies who are normally at that stage in dire financial straits. Any transactions after winding-up on the assets and properties of the companies must be shown to be done with the intention of maximising the value from these assets and properties. After all it is with the view to compensate as much as possible the stakeholders of the same including its creditors and contributories or the shareholders.

[33] However all these can be put paid if the assets and properties of the companies are transacted despite the winding-up looming or even after the winding-up orders are given. These transactions where it deprive the companies of maximum value can jeopardise the rights of the stakeholders to the highest possible recovery of what possibly remains as the only resources left for distribution. And these transactions on these assets and properties could be undertaken by any parties who have the intention to capitalise on the dire situation of the companies at that stage. Therefore this is where the validation of these transactions is needed to allow only for genuine and honest transactions to be sanctioned by the courts. In this regard hence it becomes the duty of the courts to keep a close eye of the disposal of the companies' assets having regard to the circumstances highlighted.

[34] Having explained the situations why this validation orders are needed it is now appropriate to look at s. 223 of the CA regarding this application as this was after all cited by the applicant in supporting its application. The provision states;

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[35] Hishamudin Yunus J (now JCA) in *UCM Oil-Tex Threading Ltd v. PP Technology Sdn Bhd* [2006] 6 CLJ 253 decided that because of the words 'unless the courts otherwise orders' in the above provision, the courts could still validate the disposition of property made after the presentation of the petitions to wind-up the relevant companies.

[36] The same is decided by Zulkefli Makinudin CJ Malaya at the Federal Court in *Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals* [2013] 3 CLJ 969 where it is stated that the provision does not shut out *bona fide* transactions. This case went on to say;

> However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding up, and **even after a winding up order has been granted** based on two broad considerations:
>
> (a) If the transaction(s) are beneficial to the general body of creditors; or
>
> (b) If it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned.
>
> The general rule in s. 223 of the Act is that it does not shut out *bona fide* transactions. In *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449, Seah, SCJ made reference to a passage by Vaisey J in *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 which states:

A … that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case.

B **The discretion is an unfettered one.**

(emphasis added)

[37] Two points ought to be noted from the above case, ie, validation orders can be applied even after the winding-up order has been made and the court has absolute discretion whether the same ought to be granted.

C

[38] More importantly though, following the above case in determining whether the validation orders requested should be granted, this court must be satisfied the transactions are;

(a) beneficial to the general bodies of creditors or

D

(b) it would be just and fair to allow the same having in mind the good and honest intention of the applicant and respondent in executing the transactions.

[39] On to the first issue, whether the transactions are beneficial for the E general bodies of creditors. First, the requirement is to see whether the transactions are for the benefit of not just one of the creditors but whether the transactions are beneficial for the whole cohort of creditors. It is insufficient to just satisfy one creditor but must also generally satisfy a number of creditors. This is after all consistent with the fact as explained F earlier that the stakeholders of the company including the creditors should as far as possible be allowed to enjoy the remaining resources of the company after its winding up. Satisfying and addressing the concern of one creditor for the debt due by the company therefore cannot be consistent with this first requirement as laid down by *Wong Wee Kheong (supra)*.

G **[40]** Bearing that in mind, let us consider the facts of the case for the applicant. First regarding the applicant's own contentions, what the applicant sought to do is to purchase the land and satisfy the chargee of the lands. That is only one creditor of the respondent. What about other creditors? In fact other creditors will still be left with little recourse as the price of the lands H will not satisfy the debt of the company to the chargee as pointed out by the applicant itself because the applicant contends the sum owed to the chargee bank are far more than the value of the lands. This submission of the applicant itself had been alluded earlier in this judgment when this court highlighted the applicant's contentions.

I **[41]** Based on the above facts, could this court find the transactions are actually beneficial to the general bodies of creditors? Certainly this finding could not be made for two reasons;

(a) the price of the lands itself is less than the debt owed to the chargee bank as a creditor;

(b) the other creditors of the respondent will be left with nothing with the sale of the lands because of the price not meeting the amount of debt owed to the chargee bank.

[42] So it is therefore seen that it cannot be true for the applicant to say the transactions in the form of the agreements would be beneficial to the general bodies of creditors.

[43] On then to the second requirement. Are the transactions just and fair having in mind the good and honest intentions of the applicant and respondent in executing the transactions? This court opines that the agreements cannot be just and fair as firstly the agreements does not in any manner address the positions of the other creditors or the very least the majority of them. The agreements only caters for the financial position of the chargee bank as the secured creditor.

[44] In addition, should be noted since the chargee bank is a secured creditor, the same could also proceed to take foreclosure proceeding without being concerned with the executed agreements. The foreclosure proceeding has the likelihood of generating a better price for the lands and therefore this would benefit the other creditors of the respondent in the event of a surplus. This in turn again shows that it is not true that the agreements sought to be validated are in the best interest of all the other creditors of the respondent.

[45] Secondly, the agreements cannot be also just and fair bearing in mind the intentions of the applicant and respondent in executing the same. It is the finding of this court that both had intended to unfairly and unconscionably defeat the effect of the winding-up. The winding-up was in any event within the knowledge of the respondent, yet the respondent despite the winding-up order went to execute the agreements. The applicant cannot also be absolved from blame in this regard as there is a duty on the part of the applicant as is normally done to do a corporate due diligence exercise before committing itself to the agreements. The applicant cannot claim simply it is not involved in the winding-up. Both in fact were in a haste to defeat the winding-up proceedings and the said order of the winding-up by executing the agreements. The applicant then tried to justify the action by seeking the validation orders. This court however cannot be acting justifiably if it proceeded to allow the application under the circumstances explained.

[46] Therefore, without doubt the two alternative circumstances as required by *Wong Wee Kheong (supra)* have not been met. And above all it must never be forgotten the same Federal Court's case also unequivocally decided that whether the two conditions are satisfied depend on the facts of each particular case and the court in this regard has the unfettered discretion

whether to allow the validation orders based on the facts of the case. This court hereby declare because of the inability of the applicant to meet these two conditions, the application of the applicant should not be granted.

[47] Procedurally too, the application of the applicant cannot stand. The application by way of notice of application filed by the applicant is clearly wrong. For matters pertaining to winding-up of companies and under the circumstances of this case, the application should be by way of notice of motion. This unfortunately is not what is filed by the applicant. The filling of the notice of motion is needed by r. 7(1) of the Companies (Winding-Up) Rules 1972 that states:

> Every application in Court, other than a petition, shall be made by motion and shall be served on the party effected thereby not less than two days before the day named in the notice for hearing of the motion. An application for leave to serve short notice of motion shall be made *ex parte.*

[48] In addition, the applicant in order to circumvent the requirement for leave before the validation orders are requested, side stepped that requirement and filed the notice of application. This should not be permitted as leave is required from the court for proceeding against a company such as the respondent which have been wound up. This is stipulated by s. 226(3) Companies Act 1965 which states;

> When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except;
>
> (a) by leave of the court and
>
> (b) in accordance with such terms as the Court imposes.

[49] The case of *Mustapha bin Mohamed (as the receiver and manager of Sykt Ji Seng Hong Plastic Manufacturing Sdn Bhd) v. Ji Seng Hong Plastic Manufacturing Sdn Bhd (Ng Bak Soon & Ors, petitioners)* [2014] 11 MLJ 793 also is about validation order being requested and before such order is requested this case states;

> In order to apply for the validation order, it was proper for the applicant to apply for leave to intervene in the existing winding up proceeding …

[50] Following this case, in the present case before this court, the applicant had also failed to apply for leave before making the application. Therefore it is clear that action of the applicant in making and filing the application without leave cannot be allowed.

[51] Further, the affidavits of the applicant supporting the application are also defective. In this regard the deponent of the affidavits of the applicant and the notary public before whom the deponent of these affidavits were sworn have not been shown to understand the national language. They are both Singaporeans. There are no documents whatsoever including in the

affidavits to indicate there is evidence that both of them understood Bahasa Malaysia. The applicant also could not rely on the translation in English to these affidavits as there is no indication in the first place that both the deponent and the notary public had understood the national language in order for the translation to be made. The English translation to the affidavits can only be accepted if the deponent and the notary public is proven to have understood Bahasa Malaysia because the source of that translation is in the national language. On all fours the facts as narrated regarding this point are similar to the case *Ian James Rogers v. Menteri Sumber Manusia & Satu Lagi* [1997] 1 LNS 433; [1998] 5 MLJ 290 where the affidavit in question is also declared to be defective for the same reason.

[52] To compound the matter further, the *jurat* of the first affidavit of the applicant does not flow. It is not immediately after the last substantive averment as required. A *jurat* of an affidavit must not be on a separate page not connected to the last paragraph of assertion by the deponent. This is to ensure that the deponent is certain of what he or she has affirmed. A *jurat* on a separate page attached to the affidavit all by itself runs the risk of assertions being added before that *jurat* without the knowledge of the deponent. This too makes the affidavit of the applicant in this case defective. The same is decided in the case of *Gilbert Engineering Co, Inc v. Zainuddin Ahmad & Ors* [2003] 6 MLJ 103 where the passage in the case of *Voon Mow Chen v. Menteri Dalam Negeri & Anor and Five Other Cases* [1993] 4 CLJ 195; [1993] 2 AMR 38 2199 was quoted with approval and it reads:

> It is this court's view that the reason that the *jurat* of an affidavit should not begin and end on a fresh page but rather should immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition, is in order to ensure that there is sufficient indication that the *jurat* relates directly to the deposition. This is also in order to obviate the possibility of abuse by any party…

[53] Further, there can be no dispute the applicant was before the court prior to this present application being argued. The applicant was before the court then to stay the winding-up order. The matters raised in the stay proceeding by the applicant were similar to the matters raised now for this application. These include the issues on the agreements being entered after the winding-up order but when the RO was subsisting, the validation orders benefiting the charge bank and the validation orders requested is *bona fide.* As these were already decided by the court then, it is trite that the principle of *res judicata* would apply against the applicant. See the Supreme Court's case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189.

Conclusion

[54] Based on the reasons adumbrated, in terms of substance as well as procedure, the application of the applicant cannot be allowed.

[55] In substance, the application for the validation orders is not beneficial to the general bodies of creditors or it would not be just and fair to allow the same as this court is not satisfied that were good and honest intentions of the applicant and respondent in executing the transactions.

[56] Also in substance, the arguments and points of issues raised by the applicant here is *res judicata* bearing in mind the same were already raised and decided when the applicant argued the application for stay of the winding-up order.

[57] In terms of procedure, the applicant did not filed the application according to the correct mode and the application too has been requested without the applicant filing the leave application as required.

[58] Further, the affidavits of the applicant are also defective both on accounts of the deponent of the affidavits and the notary public not proven to understand Bahasa Malaysia and the *jurat* of the applicant's first affidavit not flowing immediately after the last assertion of the deponent.

[59] The application for the validation orders therefore is hereby dismissed.